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IN THE

Supreme Court of the United States

OCTOBER TERM 1953.

No. 454

ROBERT LEHMAN, JOSEPH A. THOMAS and FREDERICK L. EHRMAN,

Petitioners,

against

CIVIL AERONAUTICS BOARD,

Respondent,

CONTINENTAL AIR LINES, INC. and NATIONAL AIRLINES, INC.,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Your petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 6, 1953 (R. 609). A majority of the Court of Appeals affirmed an order of the Civil Aeronautics Board entered on May 21, 1952 (R. 24, 603).

Opinions Below.

The majority opinion of the Court of Appeals by Judge FAHY (R. 592) and the dissenting opinion of Judge PRETTYMAN (R. 604) have not yet been reported.

The findings and opinion of the Civil Aeronautics Board (R. 122) have not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 6, 1953 (R. 609). The jurisdiction of this Court is invoked under 28 U. S. Code §1254.

Questions Presented.

1. Whether under Section 409(a) of the Civil Aeronautics Act of 1938 the Civil Aeronautics Board was authorized to conclude that a partner of an investment banking firm who is a director of an air carrier has a representative "who represents such * * * director as * * * a director" in a common carrier or aeronautical company, if another partner of the same investment banking firm is quite independently a director of a different common carrier or aeronautical company, merely because such directors occasionally seek to secure financing business for the investment banking firm from the companies of which they are directors.

2. Whether the Board could reasonably find that the public interest is adversely affected within the meaning of said §409(a) when a person holds concurrent directorships in two companies, one of which, as a minor incident to its tropical produce business, supplies slow vacation steamship cruises, and the other of which supplies rapid air transportation and derives a small fraction of its gross revenue from the area served by the produce company.

Statutes Involved.

The statutes involved are Section 409(a) of the Civil Aeronautics Act of 1938 and Section 10(e) of the Administrative Procedure Act of 1946, set forth in the Appendix

hereto. For convenience, the first three subdivisions of §409(a) are also set forth here:

> "Sec. 409(a). After one hundred and eighty days after the effective date of this section, it shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—
>
> (1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.
>
> (2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.
>
> (3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics."

Statement.

The two questions presented by this petition arise out of two separate proceedings instituted before the Civil Aeronautics Board and subsequently consolidated by it. Each question arises out of a different state of facts and

was treated separately by the Board, in the briefs filed in the Court below, and in both the majority and minority opinions below. Each will also be treated separately here.

I.

Under the provisions of §409(a)(2) and (3) of the Civil Aeronautics Act of 1938, it is unlawful for an air carrier knowingly and wilfully to have a director who has, or for any director of an air carrier to have, a representative who represents him in a company which is a common carrier or is engaged in any phase of aeronautics, unless the Civil Aeronautics Board approves upon a showing that the public interest will not be adversely affected.

Petitioner Lehman is a director of Pan American World Airways, Inc.; petitioner Thomas is a director of National Airlines, Inc.; and petitioner Ehrman is a director of Continental Air Lines, Inc. These three companies are all air carriers. In addition petitioner Thomas is a director of American Export Lines, Inc., a common carrier and Mr. John D. Hertz is a director of Consolidated Vultee Aircraft Corporation, a company engaged in a phase of aeronautics. Petitioners Lehman, Thomas and Ehrman, and Mr. Hertz are also members of Lehman Brothers, a partnership which conducts an investment banking business (R. 83-85).

On December 30, 1948 the Civil Aeronautics Board instituted a proceeding to determine whether petitioners Lehman, Thomas and Ehrman had "representatives or nominees" who were holding positions as officers or directors of other companies within the scope of §409(a) of the Act. After hearing, the Board held that an individual Lehman Brothers partner who is a director of a §409(a) company is as such a representative of another partner who is a director of another such company (R. 123-125).

The novel question of law thus decided by the Board is summarized in the opinion of the court below as follows: "More precisely the Board concluded that a Lehman Brothers partner who is director of an air carrier has a representative 'who represents such * * * director as * * * a director' in another Section 409(a) company if another Lehman Brothers partner is a director of the latter, coupled with the circumstances that he seeks on behalf of Lehman Brothers the security underwriting and merger negotiation services used by the company of which he is a director" (R. 598).

Upon the basis of such reasoning the Board found an unlawful interlocking relationship between Pan American and National; Pan American and American Export; Pan American and Consolidated Vultee; National and Pan American; National and Consolidated Vultee; and Continental and Consolidated Vultee (R. 134). On such premises it deprived those companies of the services of qualified directors chosen by the stockholders of the companies. Likewise, it deprived the directors of an opportunity to serve companies in which they had long been interested.

There was no finding by the Board that any additional special circumstances justified a conclusion of "representation" within the meaning of the statute. On the contrary, the Board adopted findings by its examiner (R. 125): that the partners involved in the proceeding had not been appointed directors as "representatives of the firm" of Lehman Brothers (R. 87); that there was no evidence that these directors were appointed "for the purpose of serving as representatives or nominees" of each other (R. 86-87), but there was evidence that each of the Lehman partners was named a director as a result of a personal interest in the company or because of personal relationships with the management of such company (R. 86); that in each instance

these partners hold or have held substantial stock interests, but not nearly controlling interests, in the respective companies (R. 86-88); that the petitioners when acting as directors exercise "independent judgment" and "individual action" (R. 88-89); that such independence was apparent from the fact that two of the petitioners had taken "diametrically opposed views and action" on important matters affecting their respective companies (R. 88); that the record was "devoid of any indication that Lehman directors have used the partnership relations to the detriment of companies of which they are directors" (R. 93); that there was no evidence that any "Lehman partner exercises any control over other partners who are directors" of any of these companies (R. 87); and that it did not appear that any of the petitioners "acted [as directors] on instructions of other partners" (R. 91-92).

For its conclusion that, in spite of these facts, each petitioner had "a representative as a director" in a §409(a) company, the Board relied on testimony by the partners themselves that in the event a company of which one was a director proposed financing "he would endeavor to secure the underwriting business for Lehman Brothers so long as the firm could do as good a job as any other banking firm" (R. 89); and that in some instances Lehman Brothers had received fees for participating in merger negotiations conducted by §409(a) companies of which Lehman partners were directors (R. 90).

That this was the only circumstance upon which the Board relied for its holding against the petitioners is evidenced by the following summary made by the examiner (R. 91) and approved by the Board (R. 125):

> "It is not implied that every act which a Lehman partner does as director of an enterprise is on behalf of the firm or its partners. The representation is

limitedly solely to such action as a partner may take in securing business for the firm and it is the only instance established by the record in this proceeding in which the Lehman partner represents the firm on the board of directors of a company."

The majority opinion below as to the first question presented.

The Court of Appeals for the District of Columbia affirmed, Judge PRETTYMAN dissenting. In its opinion (per Judge FAHY with the concurrence of Judge BAZELON), it held that community of interest due to membership in a partnership is not in and of itself a proper basis for a holding that partner-directors are "representatives" of each other within the meaning of §409(a); that it was not the intent of Congress to regulate all interlocking relationships between an aeronautical company and an investment banker. However, it concluded that because underwriting and merger negotiation activities are a substantial part of the business of Lehman Brothers, because profits from fees are shared by partners of that firm, and because aeronautical companies such as those involved in this case need and use underwriting and merger negotiation services, the partner-directors could not seek such business for the partnership without acting as its representatives and therefore as representatives of each other. "For the situation comes to more than mere community of interest and some sharing of common benefits as partners" (R. 599-600).

The court recognized that there were valid arguments to the contrary but thought they were not sufficiently cogent to lead to a reversal. Among these arguments it cited legislative history "indicating that the provisions in question were designed to prohibit an officer or director of an air carrier from 'employing' a representative as director

in another air carrier, common carrier or aeronautical company, so as to prevent evasions" (R. 601).

The court also noted the record evidence "that Lehman Brothers' partners who are directors of the regulated companies have acted on occasion quite independently and at variance with the views of each other." But it held that there had been representation "in important respects" and therefore the statute applied (R. 602).

Petitioners had argued below that the ordinary meaning of the word "representative" was the dictionary definition, i.e., "One who represents others or another in a special capacity; an agent, deputy or a substitute; * * *" (*Webster's New International Dictionary,* 2d ed., 1951, p. 2114), and that upon the basis of the plain language of the statute, a contrast of it with other Acts of Congress, and such judicial authority and legislative history as were available, a director could not be a representative of some other company's director unless he was in some way or to some extent a deputy of, or under the control of, or answerable to, such other person for his acts as a director.

The court recognized this definition as a permissible one but rejected it in this case because it gave the statutory word "a narrow meaning inconsistent with the purpose to keep the vital aeronautical industry, in its component parts, independent and competitive to the extent necessary to insure sound development in accordance with the needs of the foreign and domestic commerce of the United States, the postal services and the national defense", citing §2 of the Civil Aeronautics Act of 1938 (R. 602).

The dissenting opinion below as to the first question presented.

Judge Prettyman concluded that the fact, that Lehman Brothers upon occasion is awarded underwriting business and participates in merger negotiations on behalf of the air

carriers involved, does not make one partner-director the representative or nominee of another who is a director of a different company, within the meaning of the statute. He thought this view justified by "the plain language of the statute" (R. 605).

He recognized that "the presence of two partners on two boards of directors is the sort of interlocking relationship which Congress might have declared unlawful unless approved by the Board." He noted that in "other statutes* Congress had done just that" (R. 606).

Since he found no ambiguity in §409(a), he saw no need to look behind it to find some other legislative purpose and thus

> "to stretch perfectly plain language so as to cover a situation which the judges may feel was within the general scope of the purpose which Congress must have had in mind. To be specific, when Congress prohibits one definite sort of interlocking relationship, the courts cannot say that the purpose of Congress was to prohibit interlocking relationships and that therefore any variety of such relationship falls within the ban. The courts ought to apply a statute the way Congress wrote it, so long as they can ascertain from the language used the meaning of the statute. Beyond that the content of the statute is a matter for Congress, and if the statute as written does not cover a situation deemed by the administrative officials to be adverse to the public interest, the problem ought to be presented to Congress. In short, it seems to me in the present case that Congress

* Citing Public Utility Holding Company Act, §17(c), 15 U. S. Code §79q(c); and Banking Act of 1933, §32, 12 U. S. Code §78. Those statutes respectively expressly prohibit bank directors from becoming directors of registered holding companies and investment bankers from becoming directors of Federal Reserve member banks, unless appropriate board approval is first obtained. The contrast with the present statute strongly supports the claim, upheld by Judge Prettyman, that the Board here has stretched the statute beyond Congressional expression of intent.

> might have written something different from what it did write. But it did not do so, and we ought to apply the plain terms of the written provision. Only under the most strained interpretation can Mr. Thomas be said to be a representative or nominee of Mr. Lehman on the board of National. In the ordinary meaning of the words 'representative or nominee' he simply was not. The same applies to Mr. Lehman as a representative or nominee of Mr. Thomas on the board of Pan American" (R. 607-608).

Judge Prettyman concluded his opinion by citing the legislative history of §409(a) in support of his view and holding that the target of the statute was "vicarious directorial service", *i.e.* the employment of a representative to evade "the direct prohibition against the same person holding office in two air carriers" (R. 608). We submit that Judge Prettyman's opinion clearly represents the only permissible view of the Congressional mandate.

II.

The second question presented arises out of the fact that petitioner Lehman, in addition to his membership on the board of Pan American, is also a member of the board of United Fruit Company, a common carrier. Both Mr. Lehman and Pan American applied to the Board for approval of this concededly interlocking relationship and, at the hearing before the Board's examiner, sought to show that this concurrent holding of the two directorships does not adversely affect the public interest. The Board disapproved, although it recognized the benefits accruing from Mr. Lehman's service as a director (R. 25, 106). In their petition for review filed in the court below, petitioners

unsuccessfully contended that they were entitled as matter of law to an order approving the relationship (R. 6).

United Fruit is engaged in the fruit business, principally importing from Central and South American countries (R. 99). On some of its boats it has accommodations for a comparatively few passengers (R. 100). They make leisurely ocean voyages, measured in days or weeks, between New York or New Orleans and Caribbean ports (R. 403, 405). That service attracts people who want a slow sea trip (R. 307). Pan American is an airline company, which provides world-wide foreign and overseas air service (R. 98). It makes flights to Central American cities, largely originating in New York, New Orleans and Miami, which are measured in hours. It attracts people who want to get to these destinations, and get there fast (R. 101-102, 106-107, 307). For example, Pan American takes passengers from Miami to Guatemala in five hours; United Fruit's cruises require either eleven or eighteen days (R. 142, 403, 405).

The majority opinion below
as to the second question presented.

In affirming the Board on this aspect of the case, the court below held that the general geographical area traversed by Pan American and United Fruit "is largely the same; and each carrier offers its own type of service in the effort to obtain the custom. Competition exists between types of vacationing in, and in travelling to and fro, the same area, and therefore between the carriers which seek the traffic. The prospective travelers cannot be isolated into two groups, the members of each of which must be assumed to have determined the kind of transportation they

would use, or the kind of vacation they will choose, without considering an available alternative". Although the court acknowledged that the percentage of tourist traffic to the total carried by United Fruit was small, it concluded that this tourist traffic was nevertheless "consequential" and an integral part of the whole (R. 596).

The dissenting opinion below as to the second question presented.

The provision of the Board's order denying the Lehman-Pan American application was also the subject of Judge Prettyman's dissent. He summarized his view on this aspect of the case in the following language (R. 604):

> "To say that the competition between these two could create a conflict of interest which might produce results not in the public interest is without support in the facts, in my judgment. Of course there is a sort of competition between them, just as in some senses there is competition between all merchants of goods or services. But the totally different services proffered by these two companies make it wholly unrealistic to say that the public interest would be affected adversely by the presence of the same man on the two boards of directors. The theory of the statute is that a director of a common carrier would, in many cases, tend to stifle the development of a competing air carrier. Nothing in this record, as I see it, indicates that United Fruit might tend to obstruct Pan American because of the fact that one operates on and the other above the Gulf and the Caribbean Sea. The respective businesses are simply different sorts of business."

The Board could not, in reason, reach the result sustained by the majority below.

Reasons Relied on for Allowance of the Writ.

I. The first question presented by the present petition is an important one in the administration of the Civil Aeronautics Act of 1938. It has not been and should be settled by this Court. The Board itself recognized the novelty of the question when it announced in its opinion (R. 125):

> "This is the first proceeding under Section 409(a) of the Act which has presented the jurisdictional question of the existence of an interlocking relationship by representation rather than by the same individual having positions in both enterprises."

The broad sweep of the Board's order and of the judgment below as a precedent in future cases is but too apparent. The Board's correct characterization of the question as a "jurisdictional" one indicates that if the judgment of the Court of Appeals were left undisturbed, the Board would consider itself free to go at large and extend the application of the term "representative" to every situation in which two or more partners of a non-aeronautical firm hold membership on boards of aeronautical companies. In this case, the result has already been to deprive stockholders of the services of qualified and impeccable directors for their companies, and directors of the opportunity to serve companies with which they have had long personal associations.

Whatever might have been said for the Board's policy had it been enunciated by Congress, it is clear that no such policy is stated in §409(a). No judicial authority whatever and no specific authority of any kind was cited either by the Board or the court below for such an expansion of the Board's powers; the court having contented itself merely

with a statement of its view that its construction of the statute was consistent with the Congressional purpose to foster the needs of foreign and domestic commerce, the postal service, and the national defense. The court expressly declined to be guided by what Judge Prettyman thought was the only cogent legislative history available. The reason given by the court for disregarding this otherwise traditional aid in ascertaining the legislative purpose was that its employment here would lead to too narrow a construction of the statute (R. 601-602).

In this respect the court's reasoning was substantially in conflict with, and Judge Prettyman's dissent was in accordance with, the principle laid down by this Court in *Addison* v. *Holly Hill Co.*, 322 U. S. 607 (1944). There the administrative agency, the Wage and Hour Administrator, was authorized to define "area of production" and did so in terms of the size of a producing plant rather than in terms of geographical area. There, as here, Congress had shown in other contexts its ability to devise language conferring on the agency broader power than was in fact conferred by the express language of the statute. There, as here, the only available legislative history, though "meagre", was consistent with the ordinary meaning of the statutory words and with a narrower grant of power to the administrative agency.

Mr. Justice FRANKFURTER, writing for the Court, stated the principle in the following terms (at pp. 617-618):

> "We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging

process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of government' but with part of a legislative code 'subject to continuous revision with the changing course of events.' *United States* v. *Classic,* 313 U. S. 299, 316.

Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.' *Commonwealth* v. *Grunseit* (1943) 67 C. L. R. 58, 80. For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the grant by Congress to the Administrator to define 'the area of production' beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

II. The second question presented is also an important one involving Federal law and affects generally and

broadly the frequently-invoked judicial power to review orders of administrative agencies under §10(e) of the Administrative Procedure Act of 1946. The decision below appears to be in conflict with the principle recently announced by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474 (1951).

There the Court had occasion to consider the "substantial evidence" test of the Administrative Procedure Act, which was also applied by the court below in this case. This Court noted that while the new statutory reformulation of this test had done no more than incorporate what had already been the better practice, Congress had clearly directed that the Federal courts "must now assume more responsibility for the reasonableness and fairness of • • • Board decisions that some courts have shown in the past"; and that a board's findings must be set aside when not justified "by a fair estimate" of the testimony or the board's "informed judgment on matters within its special competence" or both (340 U. S. at p. 490). The *Universal Camera* case was remanded to the Court of Appeals for the Second Circuit for reconsideration in the light of the standards this Court had enunciated. Upon remand, the Court of Appeals, through Chief Judge Learned Hand, summarized the basic principle as follows (*National Labor Relations Board* v. *Universal Camera Corp.,* 190 F. 2d 429, 430 [1951]):

> "• • • not only were they [Courts of Appeals] to look to the record as a whole, but they were to be less ready to yield their personal judgment on the facts; at least less ready than many at times had been. Presumably that does not extend to those issues on which the Board's specialized experience equips it with major premises inaccessible to judges,

> but as to matters of common knowledge we are to use a somewhat stiffer standard. Just where the Board's specialized experience ends it may no doubt be hard to say; but we are to find the boundary and beyond it to deem ourselves as competent as the Board to pass upon issues of fact. * * *"

Failure to reverse the Board's decision on the second question here was obviously based on exaggerated deference for expert judgment where no question involving esoteric knowledge was actually involved. Had the standards laid down by this Court and stated by Judge Hand been applied to this case, it would have been found, as Judge Prettyman found, that the judgment of the Board as to the degree of present and future competition between Pan American and United Fruit had not been based on "specialized experience". The advantages and disadvantages of vacations at sea and of vacations elsewhere are not "issues on which the Board's specialized experience equips it with major premises inaccessible to judges". On the contrary, they are issues "as to matters of common knowledge" to which the court below should have applied "a somewhat stiffer standard". The Board's treatment of this subject (R. 106-107) did not indicate that it had decided this issue on the basis of any expertness beyond that to be found in common knowledge. To continue borrowing from the language of Chief Judge Hand, the court below should have deemed itself "as competent as the Board" to pass upon these issues.

Its declination to do so led to a decision in conflict with an important principle laid down by this Court, and it is, we submit, essential to the proper judicial administration of the Administrative Procedure Act that this decision be reviewed and reversed.

ARGUMENT.

I.

The Board's order was based upon an erroneous construction and application of §409(a) of the Civil Aeronautics Act. In concluding that each Lehman partner "acts as a representative" of every other Lehman partner, and in directing the termination of several of the "relationships" said to have been created thereby, the Board exceeded the authority delegated to it by Congress.

The statute on its face is designed only to prevent familiar interlocking directorships under certain circumstances between specified kinds of companies. The provision here in question is designed to prevent evasion by the use of representatives or nominees who would be subject to some form of control, at least temporarily, by their principals.

In applying §409(a) to members of the Lehman partnership the Board purported to give the term "representative" its ordinary meaning but actually gave it an exotic connotation and ignored the dictionary definition of the term, *supra* (p. 8), and the meaning of the term in its context. Both the Board and the court below also disregarded the plan and purpose of the statute which are evident from its face, *i. e.*, that the "representative or nominee" provision was intended only to prevent evasion of the direct prohibition against the same person holding office in two air carriers (§409[a][1]). The statute was not designed to reach out to embrace persons not bound in some manner either in law or in fact to carry out the instructions of directors of other companies.

The available legislative history supports the conclusion that the language of the statute was directed against those who would hold office vicariously in one of the specified kinds of companies. This legislative history was cited but not followed by the majority of the court below. In the language of the court, "there was testimony before the House Committee on Interstate and Foreign Commerce, *Hearings before House Committee on Interstate and Foreign Commerce, H. R. 9738,* 75th Cong., 3d Sess. 45 (1938), by the Assistant General Counsel of the Treasury who assisted in drafting the bill indicating that the provisions in question were designed to prohibit an officer or director of an air carrier from 'employing' a representative as director in another air carrier, common carrier or aeronautical company, so as to prevent evasions" (R. 601-602). Further support for this reading of the "representative" clause is found in the fact that §410 of S. 3845, 75th Cong., 3rd Sess., a forerunner of the statute now under consideration, contained, in addition to the words "a representative or nominee", the words "or otherwise". These latter two words were omitted in the final enactment (R. 607-608).

The only effort ever made in Congress to extend the applicability of the statute to a case such as this, failed of adoption. In 1943, H. R. 3420, to amend the Civil Aeronautics Act of 1938, was reported out of the Committee on Interstate and Foreign Commerce. Section 409(a)(B) of this bill made it unlawful "for any air carrier to have and retain an officer or director who is an officer, director, or member of, or who controls, any other person— * * * (B) who is an underwriter * * *." The bill also made it unlawful for a director of an air carrier "to hold the position of officer, director, or member" of any person who is an underwriter. Commenting on this section of the bill, the House Report states: "The principal change of substance

is the inclusion within the scope of section 409 of interlocking relationships between * * * air carriers and underwriters." *House Report No. 784,* 78th Cong., 1st Sess. 27 (1943). The bill was committed to the Committee of the Whole House on the State of the Union and ordered to be printed, 89 Cong. Rec. 8607 (1943), and there its history ends. Thus, in spite of the fact that, at least in this negative way, Congress has indicated its unwillingness to include an "underwriter" among the specified kinds of companies affected by §409(a), the Board and the court in this case have extended the legislation to include in effect interlocking directorates between air carriers and underwriters.*

Reference to other statutes *in pari materia* demonstrate that when Congress wished to go further than it did in §409(a), it has had no difficulty in expressing its intent to do so. The language in §409(a) is to be contrasted with the language in:

Section 2(a)(11)(D) of the Public Utility Holding Company Act of 1935 (15 U. S. Code §79b [a] [11] [D]) where Congress gave the Securities and Exchange Commission power to find an adverse public interest whenever a person stands in such a relation to a specified company as to create the possibility that there would be an absence of "arm's-length bargaining";

Section 17(c) of the Public Utility Holding Company Act of 1935 (15 U. S. Code §79q [c]) in which Congress gave the same Commission power to find an adverse public interest whenever an officer or director of a registered holding company is also an executive officer, director, partner,

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* As Mr. Justice Jackson pointed out in *Western Union* v. *Lenroot,* 323 U. S. 490 (1945), the correct rule is that when Congress has rejected an amendment and it does not appear that the amendment was regarded by it as surplusage, the process of judicial interpretation should not be employed to produce "an equivalent of the bills Congress rejected" (323 U. S., at pp. 508-509).

appointee or representative of any bank, trust company, investment banker or banking association or firm; and

Section 32 of the Banking Act of 1933 (12 U. S. Code §78) in which Congress gave the Board of Governors of the Federal Reserve System power to find undue influence upon the investment policies of a member bank in a case in which an officer, director, partner or employee of an underwriting firm also serves as an officer, director or employee of such member bank.

Thus every action, and indeed every inaction, of Congress that can be consulted is consistent only with the conclusion that, by enacting §409(a), it did not intend to designate a person a "representative" of a director of some other company simply because he is a banker and behaves in precisely the manner to be expected of reputable bankers by expressing a natural interest in bringing business to his firm whenever that can be done without detriment to the air carrier of which he is a director.

What little judicial authority has been found is to the same effect. In *Gilman* v. *Jack*, Me. , 91 A. 2d 207 (1952), the Supreme Judicial Court of Maine held that "a person is not a representative of an outside interest such as an investment banker if he is not in any way under the control of such interest and answerable to it for his acts." That case involved a Federal statute, namely §17(c) of the Public Utility Holding Company Act of 1935, *supra*, which had been invoked under these circumstances: Petitioner Gilman had been known to hold the same views on certain financial problems of the company as did certain investment bankers. The latter had urged him to run for director, voted for him, and their votes were necessary to his election. Nevertheless the statute was held inapplicable because the petitioner had not been shown to have owed any duty to the bankers to support or carry out their views, and there was no evidence that he was not to exercise his

own judgment in furthering the best interests of the company involved.*

The error of statutory construction committed by the court below is evidenced not only by the unambiguous language of the statute itself but also by the available legislative history and judicial precedents. Petitioners submit that the importance to the proper administration of §409(a) of the Civil Aeronautics Act requires that the writ be granted and the error of the court below corrected.

II.

There was no substantial evidence of "consequential" competition between Pan American and United Fruit and therefore no basis for depriving either of those companies of the benefits of the services of one of its directors.

As to the holding by petitioner Lehman of his directorships in Pan American and United Fruit, the Board held that, before approval of the interlocking relationship would be denied, it should appear that the competition between the two companies "necessary to transcend the benefits accruing from Mr. Lehman's service as director of Pan American must be of some consequence" (R. 106).

The evidence showed that United Fruit, which is primarily engaged in the business of growing and shipping bananas and other tropical products (R. 99), uses a portion

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* See also the concurring opinion of Chief Judge Learned Hand in *Rattner* v. *Lehman*, 193 F. 2d 564, 566-567 (C. A. 2, 1952) in which he concluded that §16(b) of the Securities and Exchange Act of 1934 (15 U. S. Code §78p[b]) was inapplicable in the absence of a showing that Lehman Brothers had "deputed a partner [Mr. Hertz] to represent its interests as a director on the board" of Consolidated Vultee. In the case at bar, there was an express finding that none of the petitioners had ever been so deputed (R. 86, *et seq.*).

of the space of six of its 51 fruit and cargo ships to transport cruise passengers (R. 100). These stop only at ports which are points of export and import for cargo (R. 100-101) and passenger service "is adjusted based on our [United Fruit's] requirements for bananas and sugar (R. 296). Analysis of the figures in the record (R. 401-405) when compared with United Fruit's published figures indicates that only about 1.5% of its gross receipts is derived from cruise passengers. Likewise, about 1.5% of Pan American's passengers to Latin America are carried to Guatemala (R. 407), the terminal port of United Fruit's cruises (R. 100-101).

The holding of the court below that the amount of competition between the two companies is "consequential" is based upon approval of the Board's theory that regardless of the types of vacation sought, there is such competition whenever two carriers serve the same "general area". Driven to its logical conclusion, this type of reasoning would justify a finding of "consequential" competition between carriers operating even in two different parts of the world, since it could never be said that if the trip were made attractive enough, a prospective traveler to Latin America might not prefer to vacation in India. Of course the vacationist's dollar is being competed for by every carrier and indeed by every owner of a landlocked vacation resort.

The error of the Board and the court below lies in the fact that when two companies derive such a tiny portion of their revenue from two such different types of services it is, as Judge Prettyman put it, "wholly unrealistic to say that the public interest would be affected adversely by the presence of the same man on the two boards of directors. * * * The respective businesses are simply different sorts of business" (R. 604). Affirmance of the Board by the majority of the court below was put upon the ground "that

it was within the competence of the Board to conclude that there had been no due showing that the potential restraint upon freedom of action would not adversely affect the public interest" (R. 597).

Petitioners submit that this aggrandizement of administrative expertise constitutes error and raises important and far reaching questions as to the standards to be applied in the review of orders of administrative agencies. The decision of the majority below virtually abdicated the duty of judicial review by its deference to administrative judgment based on imaginary expertness. As this Court has elsewhere recognized, Congress intended to end such artificial judicial humility and restore judges to their traditional role where they may be expected to know as much about everyday affairs as administrators. Surely the contrast between travel involving leisurely rest and winged speed is one upon which judges need not hesitate to require a rational administrative decision. These questions, because of their larger implications, deserve review by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit, and that a hearing upon and determination by this Court of the matters presented be had.

Dated, November 2, 1953.

Respectfully submitted,

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Appendix.

Section 409(a) of the Civil Aeronautics Act of 1938 [52 Stat. 1002, 49 U. S. Code §489(a)] reads as follows:

"Sec. 409(a) After one hundred and eighty days after the effective date of this section, it shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control

of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics."

Section 10(e) of the Administrative Procedure Act of 1946 [60 Stat. 243-244, 5 U. S. Code §1009(e)] reads as follows:

"Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

• • • • • •

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclu-

sions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 454

ROBERT LEHMAN, JOSEPH A. THOMAS, AND FREDERICK L. EHRMAN, PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 592–608) is not yet reported. The findings and opinion of the Civil Aeronautics Board, entered May 21, 1952 (R. 122–134), are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1953 (R. 609). The petition for a writ of certiorari was filed on Novem-

ber 3, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Section 409 (a) of the Civil Aeronautics Act makes it unlawful for an air carrier to have a director who also is a director of, or has a representative or nominee who represents him as a director of, any common carrier or any company engaged in any phase of aeronautics, unless such interlocking relationship has been approved by the Civil Aeronautics Board upon a showing that the public interest will not be adversely affected thereby. The questions presented are:

1. Whether the Board properly found that partners of an investment banking firm who serve as directors of air carriers, surface carriers and other aviation enterprises are representatives of other firm partners who serve as directors of other air carriers, where all of such partners seek and obtain underwriting business from, and negotiate mergers for, the companies of which they are directors, and where the investment banking firm receives substantial fees for such underwriting and merger services which all the partners share.

2. Whether there was substantial evidence to support the Board's finding that actual and potential competition between an airline and a steamship company was sufficient to preclude the Board's approval of an interlocking directorship

between the two companies as not adversely affecting the public interest.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act are set forth in the Appendix, *infra*, pp. 21–27.

STATEMENT

The Board's order in this case issued under Section 409 (a) of the Civil Aeronautics Act (Appendix, *infra*, pp. 25–26), dealt with two different types of interlocking corporate relationships. One such relationship arose out of the fact that partners in an investment banking firm who were directors of companies covered by Section 409 (a)[1] were found by the Board to be representatives of other firm partners who were directors of air carriers. The other involved an individual partner who held interlocking directorships in an air carrier and a steamship carrier. We shall discuss these two issues separately.

I

Petitioners are three partners in the investment banking firm of Lehman Brothers. Each of them is a director of an air carrier—petitioner Lehman of Pan American World Airways, petitioner Thomas of National Airlines, and petitioner

[1] The phrase "Section 409 (a) companies" denotes companies covered by that Section, *i. e.*, common carriers and companies engaged in any phase of aeronautics.

Ehrman of Continental Air Lines. In addition, Lehman is a director of United Fruit Company, and Thomas is a director of American Export Lines, both common carriers. Another Lehman partner is a director of Consolidated Vultee Aircraft Corporation, a company engaged in aeronautics, and of three other common carriers. A fifth partner is a director of another common carrier.

The Board instituted proceedings to determine whether any of the foregoing directorships involved interlocking relationships which required Board approval and, if they did, whether they were adverse to the public interest (R. 29–33, 34–37). After full public hearings, the Board found[3] that Lehman partners who were directors of these Section 409 (a) companies were in fact representatives of the other partners who were directors of air carriers, so that Board approval of the interlocking relationships was required. The Board examined the 22 resulting interlocks, approved 17 as not adverse to the public interest, and disapproved five with respect to which it found existing and potential conflicts of interest between the companies concerned (R. 98, 110, 111, 114, 125, 133, 134).[3a] The disapproved interlocks were between Continental and Consolidated Vultee; between National and (1) Pan American, and (2) Consolidated Vultee, respectively; and

[3] The Board adopted the findings of the examiner (R. 125).

[3a] Petitioners do not here challenge the Board's findings as to these conflicts of interest, but only the finding as to representation.

between Pan American and (1) American Export Lines, and (2) Consolidated Vultee, respectively.

The Board's finding that the Lehman partners who were directors of Section 409 (a) companies were representatives of petitioners rested upon a number of subsidiary findings. The Board found that Lehman partners, including those here involved, endeavor to secure for the firm, in accordance with its wishes (R. 90), the underwriting of any financing undertaken by companies of which they are directors (R. 89); that underwriting of security issues constitutes a substantial portion of the firm's business (R. 90); and that profits from underwriting securities of Section 409 (a) companies are divided among the partners in the same proportion as other profits (*ibid.*).[4] The Board further found that Lehman partners also participate in merger negotiations involving companies of which they are directors, and that profits from such services similarly accrue to the individual partners (*ibid.*). The Board concluded that "when a partner attempts to secure an underwriting or participates in merger negotiations, he acts on behalf of the firm as its representative" (R. 90–91), and that "[w]hen a Lehman partner acts in furtherance of partnership activities, he is acting on behalf of himself and each of the other partners" (R.

[4] Pursuant to the prohibition in Section 409 (a), however, partners who are directors of air carriers do not share in the profits from underwriting securities of such companies.

129). In reaching this conclusion, the Board specifically rejected the idea that every act done by a Lehman partner as a director of an enterprise is on behalf of the firm or its partners (R. 91).

The Board stated that the word "representative" in Section 409 (a) should be given its "ordinary meaning" as "a person who acts on behalf of another" (R. 126); that the question was whether such representation exists here "in fact" (R. 129); and that such representation clearly was shown by the examiner's findings "that partners who are directors do act to secure business for the partnership from the corporations which they direct, that each partner understands that other partners will so act, and that each will share in the profits which may result from the actions of his fellowpartners" (R. 127). The Board further stated that its interpretation of Section 409 (a) was in accord with the "basic Congressional purposes" (R. 126) "to avoid the possibility of a director of one company exerting pressure on competing or related companies to stifle competition or impair the ability of that company to contract on the open market for equipment" (R. 93).

The Court of Appeals affirmed the Board's order (R. 609). The court, per Judge Fahy, stated that the activity of the Lehman partners disclosed by the Board's findings "comes to more than some community of interest and some sharing of common benefits as partners" (R. 600), since it involves "literal representation by one partner of another in partnership business" (R. 601). The Board is not required, the court held, to separate the partner-directors into two separate personalities and to say that they represent each other as partners, but not as directors, where the representation is in regard to carrying on the affairs of Section 409 (a) companies (*ibid.*). The court pointed out that the Act does not speak of control of one partner by another, but of representation, and that there is such representation "when it exists in fact in substantial matters affecting the regulated companies" (R. 602). The court concluded that the Congressional intent in Section 409 (a) would not be served by giving the word "representative" "a narrow meaning inconsistent with the purpose to keep the vital aeronautical industry, in its component parts, independent and competitive to the extent necessary to secure sound development in accordance with the needs of the foreign and domestic commerce of the United States, the postal service, and the national defense" (*ibid.*).[4]

[4] Judge Prettyman, dissenting, stated that under the "plain language" of the Act one Lehman partner was not a repre-

II

Pan American and petitioner Lehman filed a joint application (R. 56) for Board approval (pursuant to Section 409 (a) of the Act) of an interlocking relationship between Pan American and United Fruit Company, a common carrier by water, arising out of Lehman's serving as a director of both companies. After hearing,[4] the Board disapproved the application on the ground that the applicants had failed to make the due showing required by the Act that the public interest would not be adversely affected by the interlocking relationship (R. 99–108, 125, 134). This conclusion was based upon findings that Pan American and United were both engaged in carrying tourist passengers between the United States and points in the Caribbean area, that each was actively seeking such traffic, and that there were potential conflicts of interest between the two companies in competing for such business (R. 100–102, 106–108). The Board, applying its settled precedents, found that the detriment to the public from these conflicting interests outweighed any possible benefits to the carriers involved (R. 108).

The Court of Appeals affirmed the Board's order on the ground that the Board's finding

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sentative or nominee of the other because "upon occasion" the firm is awarded underwriting business and participates in merger negotiations on behalf of the companies of which the partners are directors (R. 605).

[4] This application was consolidated for hearing with the Board proceedings described in Part I hereof.

"supported by substantial evidence" that the two companies were "in competition to a consequential degree" (R. 595), showed that the public interest "might suffer through the restraint which such conflict [of interest] might exert upon one who is a director of both companies and responsible for decisions in the conduct of their affairs" (R. 596–597). The court further held it was within the Board's competence to conclude that there "had been no due showing that the potential restraint upon freedom of action would not adversely affect the public interest" (R. 597).[6]

ARGUMENT

I

A. Contrary to petitioners' contention (Pet. 13), the narrow holding of the court below does not present a question of general significance in the administration of the Act.[7] There is no basis for the assertion (*ibid.*) that the "broad sweep" of the Board's order and the decision below would leave the Board "free to go at large and extend the application of the term 'representative' to every situation in which two or more partners of a non-aeronautical firm held membership on boards of aeronautical companies." Indeed, the

[6] Judge Prettyman dissented on the ground that there was an insufficient showing of competition between the two companies to support the conclusion "that United Fruit might tend to obstruct Pan American * * *" (R. 604).

[7] We shall discuss the two groups of relationships separately (see *supra*, p. 3).

Board specifically limited its finding of representation by Lehman partners "solely to such action as a partner may take in securing business for the firm and it is the only instance established by the record in this proceeding in which the Lehman partner represents the firm on the board of directors of a company" (R. 91). Similarly, the Court of Appeals stated (R. 599) that "[c]ommunity of interest due to membership in a partnership is not in and of itself sufficient to require approval of the relationship incident to partners being directors of Section 409 (a) companies. It cannot be said that a director of an air carrier has a representative who represents him as a director of another Section 409 (a) company solely because the two are partners in a third firm."

In other words, the decision below covers only the possibly unique situation of partners of an investment banking firm who serve as directors of Section 409 (a) companies and who in fact represent other firm partners who are directors of other Section 409 (a) companies in the procurement of underwriting business and the conduct of merger negotiations for those companies. A decision of such limited applicability presents no question of such general significance as to warrant further review by this Court.*

* This is the only case that has arisen under the representative provisions of Section 409 (a) since the Act was passed in 1938.

B. In giving the word "representative" in Section 409 (a) its "ordinary meaning" as "a person who acts on behalf of another" (R. 126), the Board is furthering the Act's purpose to keep the airline industry free of the possible conflicts of interest which interlocking relationships may produce. Congress did not use "representative" as a narrow word of art, but rather as a broad practical concept designed to enable the Board to determine in each case whether a particular relationship in fact involves actual representation. Significantly, Congress did not outlaw all interlocking relationships covered by Section 409 (a) generally—as it did in similar statutes [9]—but only those which the Board disapproved as adversely affecting the public interest. Indeed, in the instant case the Board found it necessary to disapprove only 5 of the 22 interlocks which resulted from the Lehman partner directorships in Section 409 (a) companies.

One of the major aims of Congress in passing the Civil Aeronautics Act was, as the declaration

[9] Cf. Section 17 (c), Public Utility Holding Company Act of 1935, 49 Stat. 830, 15 U. S. C. 79q (c), which prohibits any registered holding company or subsidiary from having a director who also is a director (or executive officer, partner, appointee or representative) of any bank, trust company, investment banker, or banking association or firm, except in such cases as the Commission may by rule permit. Section 12 of the Banking Act of 1933, 48 Stat. 194, 12 U. S. C. 78, similarly prohibits a director of an investment banking firm from serving as a director of a national bank.

of policy in Section 2 makes clear,[10] to maintain healthy and vigorous competition in the growing air transportation industry, both among air carriers themselves and in their relations with surface carriers and non-carrier aviation enterprises. To this end, Section 408 prohibits various direct and indirect (Section 413) control relationships among air carriers, surface carriers and non-carrier aviation enterprises unless approved by the Board,[11] and Section 409 requires Board approval of interlocking relationships among such companies.

The danger of possible conflicts of interest is equally great whether the same man serves as a director of two companies, or whether he is a director of only one but has a representative or nominee who is a director of the other. In either case, vigorous competition or completely independent relations between the two companies may

[10] Section 2 of the Act (49 U. S. C. 402) establishes as elements of the public interest in its administration "[t]he regulation of air transportation in such manner as to recognize and preserve the inherent advantages" thereof and the maintenance of "[c]ompetition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and the national defense."

[11] A control relationship cannot be approved if it would be inconsistent with the policy of Section 2, or would create a monopoly and thereby restrain competition or injure another air carrier. Section 408 (b). Section 412 requires Board approval of contracts between air carriers and between air carriers and various other companies.

be impeded. In these circumstances, Congress cannot be deemed to have intended in Section 409 (a) to subject all interlocking directorships by one person to Board scrutiny, and at the same time to have limited the Board's jurisdiction over interlocks through representation to those situations where the representative is an employee. To construe the Act in this way—as petitioners apparently seek to do (Pet. 8)—would, as the Court of Appeals pointed out (R. 602), facilitate the very evasions of the Act's control over all interlocking relationships which the representation provisions of Section 409 (a) were, *inter alia*, designed to prevent.

Where the director and his representative are partners in an investment banking firm, and each is seeking to obtain underwriting (and merger) business from a Section 409 (a) company, the possibilities of conflict are particularly serious. As the Board explained it (R. 131):

> The efforts of a Lehman partner who is a director of a section 409 (a) enterprise to obtain for Lehman Brothers the underwriting business of that enterprise would be a matter of financial interest to another Lehman partner who is a director of an air carrier which may compete for traffic with that enterprise. In such a situation it might well be that the prospects for Lehman Brothers obtaining this underwriting business could be materially enhanced if a Lehman partner could arrange for less

> vigorous competition for traffic by the air carrier. If the section 409 (a) enterprise were a potential supplier of the air carrier rather than a competitor for traffic, efforts to obtain underwriting business from the supplier might include efforts to facilitate sale of its products to the air carrier.

This is precisely the sort of possible conflict of interest which Section 409 (a) was designed to reach.[12] Indeed, petitioner Lehman himself, as a Pan American director, refrained from voting on interchange arrangements between that company and National Airlines because his firm had acted as underwriter for National Airlines, on whose board of directors another Lehman partner was serving (R. 333). A clearer acknowledgment of the conflict of interest between Section 409 (a) companies, resulting from the Lehman firm interlocks, would be difficult to imagine.

The legislative history upon which petitioners rely (Pet. 19–20) to support their narrow construction of the Act is not persuasive. This his-

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[12] The public interest standard of Section 409 (a) is, of course, concerned with possible as well as actual conflicts of interest. Whether particular partners ever attempted to utilize the strategic position of, or exert influence over, their representatives is immaterial, and Board disapproval of particular interlocking relationships in no way reflects adversely on the personal integrity of the individuals concerned. *Pan American Airways—Hanes, Interlocking Relationship*, 8 C. A. B. 617, 619, cited R. 597. The important consideration is that an interlocking situation capable of such effect should be subject to the Board's regulatory jurisdiction under Section 409 (a).

tory, while suggesting that *one* of the purposes of the representation provisions was to reach a director who "employed" a representative as a director of another Section 409 (a) company, does not show that this was the only purpose, or that Congress thereby intended to limit the meaning of representative to a person actually under the director's control.[13] Nor does the decision in *Gilman* v. *Jack*, 148 Me. 171, 91 A. 2d 207, aid petitioners. The dictum of the state court (Pet. 21–22)—that a person was not a representative of an investment banker if not under his control and answerable to him—was made in applying a different Federal statute to a factual situation which concededly would not create a representative interlocking relationship under Section 409 (a).[14]

[13] The failure of the House of Representatives to act in 1943 upon a reported bill to extend Section 409 (a) to prohibit any underwriter from serving as a director or officer of an air carrier does not, contrary to petitioners' suggestion (Pet. 19–20), show any Congressional intent in 1938 not to cover interlocking relationships involving representatives who were partners of underwriting firms.

[14] Petitioners also rely (Pet. 22) on the concurring opinion of Judge Hand in *Rattner* v. *Lehman*, 193 F. 2d 564, 566–567 (C. A. 2). That case held that partners were not liable under the insider-trading provisions of Section 16 (b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. 78p (b), for the partnership's short-swing profits solely because one of the partners was a director of the company concerned. Judge Hand's concurring opinion stated that he was not deciding whether the partners would be liable if they had "deputed" a partner to represent their interests on the board of directors.

In short, petitioners' reading of Section 409 (a) is not supported by the purpose or language of the Act, its legislative history, or judicial decision.[15] The Board's interpretation, on the other hand, is a reasonable one which fully effectuates the intent of Congress.

C. The Board's findings clearly establish that the Lehman partners serving as directors of Section 409 (a) companies were in fact representatives of petitioners. These findings—which petitioners do not challenge—are that such partners act on behalf of the firm in securing underwriting business from, and conducting merger negotiations for, Section 409 (a) companies; that the fees from such underwritings and merger negotiations constitute a substantial portion of the Lehman firm's income; and that all of the partners share in such fees. Petitioners' contention (Pet. 2) that such underwriting and merger activities are only "occasional"—upon which Judge Prettyman's dissent was grounded (R. 605)—has no support in the record.[16]

[15] Petitioners' contention (Pet. 14–15) that the decision below conflicts with *Addison* v. *Holly Hill Co.*, 322 U. S. 607, is without merit. Patently, a case interpreting the phrase "area of production" in the Fair Labor Standards Act has no applicability in determining the meaning of "representative" under the interlocking relationship provisions of the Civil Aeronautics Act.

[16] The record shows that over a 15-year period the Lehman firm obtained or participated in at least 70 underwritings of security issues for companies on whose boards of directors firm partners were sitting, including companies here involved

The fact, relied upon by petitioners (Pet. 18), that the partner-directors are not required to carry out instructions of the firm and their fellow partners does not negate the existence of representation. For, as the Court of Appeals pointed out, the Act speaks of representation, not of control, and representation is present when it "exists in fact in substantial matters affecting the regulated companies" (R. 602). Indeed, the record shows that the business community generally (R. 505, 539, 540), and the Lehman firm itself (R. 500, 512, 523, 525), refer to Lehman partners who serve as corporate directors as "representatives" of the firm.

II

As petitioners concede (Pet. 22), the second question presents only the narrow issue whether there was substantial evidence to support the Board's finding that the competition between Pan American and United Fruit was sufficiently "consequential" to preclude approval of the interlock-

(R. 568–575). The record also shows that Lehman partners or employees took part in merger negotiation involving National and Northeast Airlines (R. 410–420, 423–432); Braniff Airways and National (R. 453); Capital Airlines and National (R. 430–432, 541–567); Delta Air Lines-National (R. 436–447); Pan American-National (R. 447–451); Continental Air Lines-Mid-Continent-National (R. 497–498); Consolidated Vultee Aircraft Corp. and Lockheed Aircraft (R. 370); Consolidated Aircraft and Consolidated Vultee Aircraft (R. 353). This is not a record of "occasional" forays into the activities on which the Board's and the Court's findings were based.

ing directorate between them. The Court of Appeals carefully reviewed the evidence on this point (R. 595–596), and concluded that it fully supported the Board's findings (R. 597). This conclusion clearly was correct, and presents no issue warranting further review by this Court.

Petitioners' argument (Pet. 24) that the Court of Appeals gave undue "deference to administrative judgment based on imaginary expertness," misconceives the nature of the Board's inquiry in a Section 409 (a) proceeding. Under the Act, applicants for approval of an interlocking directorship are required to make a due showing that the public interest will not be adversely affected thereby. Such a showing must negative the possibility of any actual or potential conflict of interest between the two carriers. *Ames-Continental A. L., Interlocking Relationship,* 1 C. A. A. 498, 500; *Darling-Canadian Colonial, Interlocking Relationships,* 1 C. A. A. 641, 647. Whether such a showing has been made obviously calls for exercise of the Board's expert judgment as to the effect upon an air carrier of competition from a surface carrier serving the same area. Cf. *United States Lines Co.* v. *Civil Aeronautics Board,* 165 F. 2d 849, 852 (C. A. 2); *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board,* 197 F. 2d 384, 386, 388 (C. A. D. C.).

There was ample evidence to support the Board's conclusion that the competition between Pan American and United Fruit was sufficiently

significant to preclude it from finding that an interlocking directorship between them would not adversely affect the public interest. The record shows that both carriers actively promote and provide tourist service between the United States and the Caribbean area (R. 100, 106, 107, 400, 401, 402, 405), and that the volume of such business is substantial (R. 102, 401, 407). While Pan American offers rapid transportation and United Fruit provides leisurely cruises, both carriers are seeking traffic from the same pool of potential customers—persons seeking a Caribbean vacation at tourist rates. When to this present competition is added the future competition, of which the Board took account, it seems clear that the effect of the interlocking directorate upon the two carriers was sufficient to preclude Board approval.

CONCLUSION

The petition presents no substantial question justifying further review by this Court, the decision below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

The relevant provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 973, 49 U. S. C. 401, *et seq.*), are:

Declaration of Policy

Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted

to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

GENERAL POWERS AND DUTIES OF THE AUTHORITY (BOARD)

General Powers

SEC. 205. (a) The Authority [Board] is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

Acts Prohibited

SEC. 408. (a) It shall be unlawful, unless approved by order of the Authority [Board] as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other

phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Power of Authority [Board]

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Authority [Board], and thereupon the Authority [Board] shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to

have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Authority [Board] finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Authority [Board] shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than air carrier or affiliated therewith within the meaning of section 5 (8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Authority [Board] shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

Prohibited Interests

Interlocking Relationships

Sec. 409. (a) After one hundred and eighty days after the effective date of this section, it shall be unlawful, unless such relationship shall have been approved by order of the Authority [Board] upon due showing, in the form and manner prescribed by the Authority [Board], that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder

holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

Pooling and Other Agreements

Filing of Agreements Required

Sec. 412. (a) Every air carrier shall file with the Authority [Board] a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancelation thereof, between such air car-

rier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

Approval by Authority [Board]

(b) The Authority [Board] shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancelation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Authority [Board] may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

Form of Control

SEC. 413. For the purposes of this title, whenever reference is made to control, it is immaterial whether such control is direct or indirect.

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